Supreme Court, U. S.
FILED
SEP 7 1997
CLERK

(2)

No. 97-246

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1997

BILLY FRANK VICKERS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether Vickers' claim that the testimony of a co-defendant was improperly admitted as the fruit of Vickers' improperly obtained confession is procedurally barred, whether it is otherwise without merit because his confession was properly obtained, and whether the testimony of his co-defendant would have been obtained in any event.**

2. **Whether a bullet was properly seized from Vickers' body by medical personnel, and, even if its initial seizure was improper, whether its ultimate seizure was inevitable.**

3. **Whether Vickers' jury was misled regarding his parole eligibility on a life sentence.**

4. **Whether the special issue submitted to Texas juries in response to *Penry v. Lynaugh* violates *Furman v. Georgia.***

5. **Whether the definition of mitigating evidence given to the jury was unconstitutionally narrow.**

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

[1] The Petitioner will be referred to as "Vickers" and the Respondent as "the State." "Pet." refers to the Petition. "SR" refers to the transcription of the testimony at trial, by volume and page number. "Tr" refers to the documents filed in the state trial court.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming Vickers' conviction and sentence of death is attached to Vickers' petition. *Vickers v. State*, No. 71,801 (Tex. Crim. App. 1996).

JURISDICTION

Vickers seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Vickers bases his claim upon the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Vickers was indicted in cause number 14793 on August 18, 1993, in the 6th Judicial District Court of Lamar County, Texas, for the capital offense of murder while in the course of robbery. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West 1996 Supp.). After a change of venue, Vickers was tried in the 199th District Court of Collin County, Texas, under cause number 199-80910-93. Vickers was tried before a jury upon his plea of not guilty and found guilty of the capital offense on October 8, 1993. On October 13, 1993, following a separate punishment hearing, the jury returned a verdict in which it affirmatively answered the first two special punishment issues and negatively answered the third special punishment issue submitted pursuant to article 37.071, §§ 2(b)(1), 2(b)(2), and 2(e) of the Texas Code of Criminal Procedure (West 1996 Supp.). In accordance with state law, the trial court

assessed Vickers' punishment at death.

Vickers appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which affirmed his conviction and sentence on December 18, 1996. *Vickers v. State*, No. 71,801 (Tex. Crim. App. 1996). This Petition followed.

B. Statement of Facts

1. Guilt-Innocence Phase

The victim, Phillip Kinslow, ran the Arthur City Superette in Lamar County, cashing payroll checks as a part of his services. 22 SR 83. On the evening of March 12, 1993, the victim's wife was at home, expecting him to be coming home from the store with a large amount of money as usual, when she heard rapid gun fire and saw a pair of headlights at the front gate. 22 SR 84, 90-92. Her husband then drove up the driveway, and, as a consequence of gunshot wounds he had received, ran off the road and hit a tree. 22 SR 96. A money bag found in his truck contained $18,300.00, and his handgun contained six spent shells and had been recently fired. 22 SR 73-74, 105. The medical examiner determined that the victim had been shot once in the chest and twice in the right arm. 22 SR 128-29. One .22 caliber bullet was recovered from his body. 22 SR 135.

Approximately 22 hours after the shooting, the police received a report of a suspicious person with blood on his leg about two miles away from the scene of the murder. 22 SR 63, 71-72. Upon arrival, an officer found Vickers walking with the help of some tree branches, apparently shot three times in the leg. 22 SR 63, 71, 246. A bullet recovered by medical personnel from Vickers' knee was found to have been fired from the victim's gun. 23 SR 627. A footprint found near the scene of the crime was found to have been made by the same size, brand, and style of Reebok shoe that Vickers was wearing when he was found. 23 SR

679-80. A tracking dog brought to the scene tracked a scent through a wooded area, finding a toboggan hat in the process. 22 SR 166-68. This hat was found to contain hairs that were consistent with Vickers'. 25 SR 750. When officers discovered a place nearby where someone had bled and laid down some branches to make a bed, the dog tracked that new scent to a location just yards from where Vickers was found. 22 SR 171-173.

Vickers and his co-defendants, Tommy Perkins and Jason Martin, had been seen at the victim's store earlier on the day of the offense. 23 SR 322. The three co-defendants were also seen together at Vickers' house the evening of the offense. 23 SR 336.

Vickers' co-defendant, Jason Martin, testified pursuant to a plea bargain. He testified that Vickers had approached him requesting information about various businesses that could be robbed, including the victim's store. 23 SR 368-70. Martin went with Vickers to the victim's store on at least four occasions in preparation for the robbery. 23 SR 382, 390, 417, 431. They also went to the victim's home twice beforehand. 23 SR 396, 398, 402. The plan was for Martin to drive the getaway car and for Vickers and Perkins to rush the victim at the gate to his driveway, tie him up, take his money, and drive his truck to where Martin would be waiting. 23 SR 458. Before they left Vickers' house for the robbery, Martin observed Vickers with a .22 caliber pistol and Perkins with a .38 caliber pistol. 23 SR 424. Vickers' still had the pistol in the car on the way to the robbery, 23 SR 463, and a subsequent search of Vickers' home revealed .22 caliber ammunition. 22 SR 239. Martin did not witness the actual robbery and the co-defendant Perkins did not testify at Vickers' trial. However, both Martin and Perkins' girlfriend recounted Perkins' statements to them that Vickers had approached the victim and exchanged gunfire with him. 23 SR 482; 24 SR 707.

2. Punishment Phase

Aside from testimony of seven individuals regarding Vickers' bad reputation in the community, the State introduced evidence at the punishment phase that Vickers had previously been twice convicted of Burglary, twice of being a Felon in Possession of Burglary Tools, and also of Arson and Conspiracy to Commit Arson. State's Exhibits 50-57.

REASONS FOR DENYING THE WRIT

I.

The Question Presented for Review Is Unworthy of this Court's Attention.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Vickers advances no compelling reason in this case, and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the Petition presents no important question of law to justify this Court's exercise of its *certiorari* jurisdiction.

II.

Vickers' claim that the testimony of a co-defendant was improperly admitted as the fruit of Vickers' improperly obtained confession is procedurally barred and is otherwise without merit because his confession was properly obtained and because the testimony of his co-defendant would have been obtained in any event.

Vickers first claims that the testimony of a co-defendant was improperly admitted because it was the fruit of custodial statements that Vickers gave after he was denied his requests for the appointment of counsel and misled as to the consequences of making a statement. This claim fails because it is procedurally barred, because Vickers' initiated all questioning, because his statements were voluntary, and because it was inevitable that the State would have obtained the testimony of Vickers' co-defendant.

A. Procedural Default

In claiming error in the Court of Criminal Appeals' failure to grant relief on this claim, Vickers fails to note that the Court of Criminal Appeals did not address this claim on the merits due to his failure to raise it timely at trial. Specifically, the court found that Vickers had only objected prior to trial to the admission of his own confession and did not challenge the admissibility of the co-defendant's statements until forty pages into that individual's testimony. Pet. App. A-38; 23 SR 405.

The Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment" because it "in fact lack[s] jurisdiction to review such independently supported judgments on

direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix v. Singletary*, 117 S.Ct. 1517, 1522 (1997) (*citing Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Michigan v. Long*, 463 U.S. 1032, 1042 (1983); *Engle v. Isaac*, 456 U.S. 107, 129 (1982).

Vickers has not alleged that the procedural bar applied by the Court of Criminal Appeals was not independent or adequate, nor has he alleged any other ground for avoiding the application of the bar.[2] Because Vickers has made no argument as to why this

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[2] In the context of habeas corpus proceedings, the Court has held that the failure to preserve error in state court may be excused if a petitioner satisfies the "cause and prejudice" standard or if his claim comes within the "fundamental miscarriage of justice" exception. To establish cause, a habeas petitioner must ordinarily identify circumstances external to the defense that prevented properly asserting a claim in state court. *McCleskey v. Zant*, 499 U.S. 467, 497 (1991), *citing Murray v. Carrier*, 477 U.S. 478, 492 (1986). Ineffective assistance of counsel cannot constitute cause unless deficiencies or omissions in counsel's performance both resulted in the default and constitute constitutionally ineffective assistance at trial or on direct appeal. *Coleman v. Thompson*, 501 U.S. at 752. The requisite showing of prejudice is significantly greater than that required to establish plain error. "The habeas petitioner must show 'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" *Murray v. Carrier* , 477 U.S. 478, 493, *citing United States v. Frady*, 456 U.S., 152, 170 (1982). A petitioner comes within the fundamental miscarriage of justice exception to the "cause and prejudice" requirement (1) if, as a consequence of the identified constitutional error in the guilt-innocence phase and in light of new evidence, "it is more likely than not that no reasonable juror would have convicted him," *Schlup v. Delo*, 513 U.S. 298, 329 (1995), or (2) if he establishes "by clear and convincing evidence that, but for

Court should abrogate one of its most fundamental principles of review, certiorari review is unwarranted.

Even if the bar were not to apply, however, Vickers' claims would still be without merit. The record demonstrates that Vickers' rights to counsel were observed, that he was not deceived regarding the charges against him, and that all evidence admitted at trial was obtained independently of Vickers' confession.

B. Sixth Amendment Claim

It is undisputed that the Sixth Amendment precludes the interrogation of a suspect after he has invoked his right to counsel. *Michigan v. Jackson*, 475 U.S. 625 (1986). However, where a defendant initiates communication with authorities, the right to counsel is not violated. In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980), the Court held in the context of a Fifth Amendment claim that "an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

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the constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty" under state law. *Sawyer v. Whitley*, 505 U.S. 333, 350 (1992).

The Director notes that the Court has not previously applied these exceptions to cases on direct appeal. However, even if applicable, the only possible cause that Vickers could allege would be the ineffective assistance of counsel. Of course, Vickers did not allege such a claim in the court below and thus cannot urge it in order to overcome the procedural bar here. *See Murray v. Carrier*, 477 U.S. 478, 489 (1986) (noting that "a claim of ineffective assistance [must] be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default").

communication, exchanges, or conversations with the police." Similarly, the Court held under the Fifth Amendment in *Oregon v. Bradshaw*, 462 U.S. 1039, 1043 (1983), that the defendant's comment, "[w]ell, what is going to happen to me now" opened the door to further questioning by authorities even though he had previously requested counsel.

Though *Edwards* and *Bradshaw* were decided on Fifth Amendment grounds, the Court has specifically noted that much of the reasoning of *Edwards* applies in the Sixth Amendment context. *Michigan v. Jackson*, 475 U.S. at 635. The Court has also several times implicitly adopted the *Edwards* exception for defendant initiated conversations. In *Jackson*, for example, the Court's holding that "[j]ust as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis" reflects the adoption of the *Edwards* exception for cases of defendant initiated conversations. *Id.* at 635-1410-11. When the Court restated the holding of *Jackson* in *Michigan v. Harvey*, 494 U.S. 344, 345 (1990), it again limited its statement of the prophylactic rule to "police-initiated conversation." The Court then specifically rejected the "contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney" because such a "view would render the prophylactic rule adopted *Jackson* wholly unnecessary, because even waivers given during defendant-initiated conversations would be per se involuntary or otherwise invalid, unless counsel were first notified." *Id.* at 353. Similarly, in *Patterson v. Illinois*, 487 U.S. 285, 291 (1988), the Court summarized the rule under *Jackson* as including the exception for defendant initiated conversations: "[h]ad petitioner indicated he wanted the assistance of counsel, the authorities' interview with him would have stopped, and further questioning would have been forbidden (unless petitioner called for such a meeting)." It is thus clear that a defendant may waive his Sixth Amendment right to

counsel by initiating conversation with officials, just as in the Fifth Amendment context.

Finally, though the Court has not explicitly so held, it is reasonable to assume that, as in the Fifth Amendment context discussed below, evidence that is obtained independently of a Sixth Amendment violation is admissible. As discussed above, the analysis given to Fifth and Sixth Amendment issues is not significantly different in this area. Reference to the Sixth Amendment case of *Michigan v. Harvey*, discussed above is also worthwhile in this regard. Notably, when the Court set out the general rule that "after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid," it also incorporated the Fifth Amendment general rule that "evidence obtained *pursuant to* such a waiver is inadmissible in the prosecution's case in chief." (emphasis added). *Harvey*, 494 U.S. at 349.

The record reflects that, after he was taken to the hospital for gunshot wounds, Vickers was arraigned on the charge of murder and commented that "I guess now I need to see my lawyer" or "talk to my lawyer." 4 SR 12. No questioning of Vickers was conducted at that time. Vickers specifically requested counsel during his transport between the hospital and jail on March 17, 1993. 4 SR 32, 36. Again, law enforcement officers made no attempt to question him after he made this request. 4 SR 33. However, once at the jail, Vickers initiated contact with authorities by requesting to talk to a Texas Ranger and another investigator. 5 SR 273-74. After he learned that they were both out of town, he requested to talk to another officer on March 18, 1993. 5 SR 274-76. During that conversation, Vickers indicated that he wished to be informed of ballistics test results when they came in. 4 SR 60. When he was later informed that the results implicated him, he gave a written statement on March 26, 1993. 4 SR 61-62.

The officer also testified that, before Vickers implicated his co-defendants, the authorities had already obtained statements from witnesses identifying the co-defendants as being with Vickers and had even taken a statement from Vicker's co-defendant, Perkins, implicating Vickers as the shooter. 5 SR 239-42.

Vickers' statement was not introduced against him at trial. He challenges only the admission of his co-defendant's testimony as a fruit of his confession.

Vickers first states that he invoked his right to counsel at his arraignment. Pet. at 4. However, the state trial court specifically found that Vickers' first comment in his hospital room, where he was arraigned, that "now all I need to do is see my lawyer" was not a request that counsel be appointed. 5 Tr 435. The issue is irrelevant, however, because no questioning of Vickers was conducted at that time. The court found that Vickers actually did request counsel during his transport between the hospital and jail, but it also found that law enforcement officers made no attempt to question him after this request. 5 Tr 435-36. On the other hand, the trial court found that it was Vickers who initiated contact with authorities on March 18, 1993, by requesting to talk to officials. 5 Tr 436-38. Again, contrary to Vickers' assertion that he did not request to speak with officers, Pet at 3, the trial court found that Vickers requested to be informed of ballistics test results and that he initiated contact with authorities after being advised that the results had come in. 5 Tr 440-42.

Because Vickers clearly did initiate the questioning which led to his statement, no Sixth Amendment violation has been shown. Therefore, any statement by Vickers' co-defendant cannot be the product of improper questioning of Vickers'.

Finally, even if Vickers has demonstrated a Sixth Amendment violation, the testimony of his co-defendant was properly admitted as it would have been obtained inevitably. As noted above, at the time that Vickers gave his statement, officials already had located witnesses placing the co-defendant's with Vickers on the day of the murder, and had already obtained a statement from one of the co-defendants (who did not testified at trial) setting out the facts of the offense. Thus, Vickers' argument that his confession "led to the discovery" of the co-defendant who testified at trial is incorrect. Because the testimony of the co-defendant would have been obtained regardless of Vickers' statement, the Sixth Amendment does not mandate its suppression. Accordingly, this claim does not merit this Court's certiorari jurisdiction.

C. Fifth Amendment Claim

Vickers also claims that the interrogating officer misled him into confessing by not telling him that he could receive the death penalty and by giving an incorrect estimate of the sentence Vickers would receive.

The Court has held that the voluntariness of a confession must be judged in light of the totality of the circumstances to determine whether it was the "product of a free and deliberate choice" and whether it was made with a "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). *See also*, *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (holding that "[t]he fact that the police misrepresented the statements that [a codefendant] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible").

Here, Vickers was not misled into giving his confession, but made it with full awareness of the consequences of what he

was doing. Vickers' assertion that he was not informed of the possibility of capital murder charges is contradicted by the record. During his March 26, 1993, interview with Vickers' the investigating officer specifically compared Vickers' situation to an earlier capital murder case that Vickers had been involved in. *See* State's Exhibit 4 (Suppression Hearing) at 47, 54. He also pointed out that Vickers' co-defendants would probably implicate Vickers if given the chance because "[w]hen they're looking at capital murder charges, getting the death penalty or life in prison without parole or whatever, yea, I think they're gonna sing." *Id.* Though Vickers wanted to make a deal for a non-aggravated sentence, the officer told him that he could not make any deals, and the trial court found that Vickers knew that the officer could not make any deals. 4 SR 67; 5 SR 168. The officer also related a message from the district attorney that there would be no deals and that Vickers would be prosecuted "balls to the wall," with the prosecution "going for the max." 4 SR 72; 5 SR 443-45. It was only after Vickers was told that no deals would be made that he advised the officer that he still wanted to make his statement. 4 SR 76. At an unknown point in the questioning, the officer also told Vickers that he might be looking at between 30 years and a life sentence. 5 SR 214, 247-48.

Based on the interrogating officer's testimony at the suppression hearing, Vickers asserts that the officer did not tell him that he was looking at a possible death sentence because it would have had a "chilling effect" on the interview. The officer did not state this, however, but merely agreed with defense counsel during the hearing that mention of the death penalty can have a chilling effect on an interview. 5 SR 176. As noted above, during his questioning of Vickers, the officer specifically compared Vickers' situation to an earlier capital murder case that Vickers had been involved in and pointed out that Vickers' co-defendants would probably implicate Vickers if given the chance because they would be facing capital murder charges on the case. Although Vickers wanted to make a deal for a non-aggravated sentence, the

officer told him that he could not make any deals, and the trial court found that Vickers knew that the officer could not make any deals. 5 Tr 444. The trial court concluded that Vickers was aware of the possibility that this was a capital murder case. 5 Tr 445.

At an unknown point in the questioning, the officer did tell Vickers that he might be looking at between 30 years and a life sentence. However, as the trial court found, this reference did not reflect that any promises of leniency or deals had been made to the defendant, and Vickers did not believe that there had been. 5 Tr 449-50.

Presumably, the officer's statement of the possible time Vickers was facing was also based upon the idea that Vickers was telling him the truth about the extent of his involvement in the crime. However, review of Vickers' statement reveals that he denied being the actual shooter, contrary to the evidence admitted at trial. *See* State's Exhibit 10 (Suppression Hearing) at 10. Additionally, as the trial court also found, the officer specifically told Vickers that there were no deals for his cooperation, yet Vickers still signed his written statement two hours later. 5 Tr 450. As the court concluded, "[n]o law enforcement officer or other person acquired any statement from the defendant by means of trickery." 5 Tr 453.

Given the above record, it is clear that Vickers' confession was voluntary. It is simply irrelevant to the voluntariness of the confession that the officer gave him an erroneous estimate of the time he was facing, when that estimate was based upon erroneous information provided by Vickers. Further, the officer's statement that the co-defendant would be facing capital murder charges obviously would have made Vickers aware that he would also be facing such charges if he was the triggerman. Finally, it is notable that the officer did state that Vickers could be facing a life sentence and that the State did subsequently make a plea bargain offer to Vickers for a life sentence on the capital murder charges.

3 SR 8. Thus, the officer was correct in this respect. For these reasons, Vickers was not misled into giving his confession, and any testimony given by his co-defendants also cannot be the product of any improper questioning.

Finally, even if Vickers has demonstrated a Fifth Amendment violation, the testimony of his co-defendant was properly admitted. As noted above, at the time that Vickers gave his statement, officials already had located witnesses placing the co-defendant's with Vickers on the day of the murder, and had already obtained a statement from one of the co-defendants setting out the facts of the offense. Thus, the testimony of his co-defendant would have been obtained independently, regardless of Vickers' statement.

For all these reasons, this claim does not merit this Court's certiorari review.

III.

A bullet was properly seized from Vickers' body by medical personnel, and, even if its initial seizure was improper, its ultimate seizure was inevitable.

Vickers next claims that officers improperly seized a bullet that was removed from his leg after he was taken to a hospital. He asserts that the bullet could not be taken from him without a warrant. This argument fails because the bullet was seized by private citizens and was not seized by law enforcement personnel until a warrant had been obtained. It also fails because it was inevitable that the bullet would have been seized pursuant to a warrant.

The Court has held that "'seizure' of property occurs when there is some meaningful interference with an individual's

possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Where a private citizen make a seizure, the test for suppression is "whether an individual, 'in light of all the circumstances of the case, must be regarded as having acted as an 'instrument' or agent of the state' in conducting a search or seizure." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). As the Court noted in *Coolidge*, "it is not part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." *Id.* at 488. *See also State v. Perea*, 626 P.2d 851 (N.M. App.) (finding no improper seizure where a nurse seized the defendant's shirt and handed it over to the police because she believed a crime may have been committed), *cert. denied*, 627 P.2d 412 (N.M. 1981); *Commonwealth v. Storella*, 375 N.E.2d 348 (Mass. 1978) (finding no improper seizure where a surgeon removed a bullet because it was necessitated by "good medical practice" and did not act as a result of police pressure).

In this case, Vickers has failed to demonstrate that medical personnel who seized the bullet from his leg were acting as agents for the State. They did not remove the bullet from him at the State's instigation or in order to assist the State's investigation. Further, he has not demonstrated that the State actually took possession of the bullet prior to a warrant being issued, as the officer guarding Vickers simply had the medical personnel lock the bullet up in their own facilities.

Vickers' hospital records reflect that "[h]e came in mainly for increasing pain." Defense Exhibit 3 (Suppression Hearing) at 3. Vickers was taken to the hospital by law enforcement officers, but the officer guarding Vickers at the hospital did not request that he be operated on, nor did he request that medical personnel give him any foreign objects removed from Vickers. 24 SR 605-20. Instead, Vickers signed a consent form to the "surgical removal of bullet from left knee." Defense Exhibit 3 (Suppression Hearing) at 47. The doctor testified that the normal course of treatment for

injuries such as Vickers' is to remove the damaged tissue and debridement, apply antibiotics, and allow it to heal. 5 SR 302. That normal course of treatment was followed here.

An officer was in one of the hospital patient rooms waiting for Vickers when a nurse advised him that the doctor wanted the officer to go to surgery to get the bullet. 24 SR 615. The officer would not have gone to the emergency room but for that request, and, when he did go, he was handed the bullet without making a request for it. 24 SR 605, 610. Rather than keep the bullet without a warrant, the officer had hospital personnel lock the bullet in a room under the sole control of the hospital until a search warrant, which he had been advised was being prepared, arrived. 23 SR 562; 24 SR 605, 611.

Because the bullet was not seized by agents of the State, Vickers has failed to demonstrate a Fourth Amendment violation.

Additionally, Vickers has presented a classic claim of inevitable discovery in the Fourth Amendment context. As the Court affirmed in *Murray v. United States*, 487 U.S. 533, 542 (1988), where police have improperly seized evidence, it may be properly seized pursuant to a search warrant so long as the warrant is based upon independent information. Here, there is no possible argument that the search warrant was based upon the allegedly improper seizure of the bullet. Instead, as the officer testified, the warrant was already being prepared before he received the bullet. Accordingly, the ultimate seizure of the bullet by search warrant was proper.

For these reasons, this claim does not merit this Court's certiorari jurisdiction.

IV.

Vickers' *Simmons v. North Carolina* claim is without merit in light of the record.

Vickers next claims that the trial court erred in refusing to instruct the jury that he would serve at least 35 years in prison if given a life sentence. This claim is utterly without merit in light of the instructions and argument given to the jury that Vickers would *never* be released on parole if given a life sentence.

In *Simmons v. North Carolina*, the Court reaffirmed the principle that the states are generally free to decide whether a capital sentencing jury should be informed of the possibility of the defendant's early release if sentenced to life imprisonment. *Simmons*, 114 S. Ct. 2187, 2196 (1994) (plurality opinion); *id.* at 2200 (O'Connor and Kennedy, JJ., concurring in judgment). As an exception to this general rule, however, the Court held that a capital defendant has a due process right to inform the jury of his ineligibility for parole where (1) life without the possibility of parole is the alternative to a death sentence, and (2) future dangerousness is a sentencing inquiry. *Id.* at 2190 (plurality opinion); *id.* at 2201 (O'Connor and Kennedy, JJ., concurring). The concern underlying this exception is that jurors reasonably could be expected to believe that a defendant sentenced to life in prison would be eligible for parole at *some* point, and the absence of an instruction or other information about parole ineligibility was thus misleading where there was no such possibility. *Id.* at 2194-95; *id.* at 2191 (plurality opinion). Consistent with this rationale, *Simmons* specifically excepted from its holding those states, such as Texas, in which life without parole is not a sentencing option. *Id.* at 2195-96 nn.7-8.

In contrast with many capital cases in Texas, however, here the jury was given the exact instruction that was not given in *Simmons*. It was instructed,

> in answering the Special Issues given in this charge and in determining punishment in this case, that you must not discuss among yourselves, speculate or consider how long the defendant will be required to serve any sentence of confinement or to speculate upon or consider any possible actions of the Parole Division of the Texas Department of Criminal Justice. *You are instructed that a Life Sentence in a Capital Murder case means life.*

5 Tr 408-09 (emphasis added). Thus, the jury could not have believed that Vickers would be eligible for parole in some short time period because it was actually erroneously instructed to Vickers' benefit that he would never be eligible for parole if given a life sentence. Further, defense counsel's argument at punishment repeatedly reinforced this instruction:

> I don't think you'd be giving him anything by making him spend *the rest of his life* in the penitentiary. That's not letting somebody go. That's not letting them get away without paying for their crimes. *A life sentence is a life sentence in a capital case.* This man would have to spend *the rest of his life* in the penitentiary. [27 SR 1105-06]
>
> He's going to at the very least spend every waking day in a penitentiary *until he dies*. [27 SR 1109]
>
> He's going to get a life sentence at the very least. *Life means life*. [27 SR 1112]
>
> He's going to be there for *the rest of his life*. [27 SR 1113]

> Mr. Vickers will be spending *the rest of his life* in the penitentiary if you give him a life sentence. [27 SR 1117]
>
> He will never have a free day for *the rest of his life*. [27 SR 1117]
>
> I don't see how society will be harmed at all by Mr. Vickers serving *the rest of his life* in the penitentiary as opposed to the state one day executing that man. [27 SR 1118]
>
> The punishment will be severe. *He will die in the penitentiary*. [27 SR 1120]
>
> [A]re we better off executing this man or as a society will the ends of justice be served if you know that he's going to spend *the rest of his life* in the penitentiary. [27 SR 1121]
>
> I think justice will be served if Mr. Vickers spends *the rest of his life* in the penitentiary . . . . [27 SR 1122]

The prosecution made no attempt to dispute these statements. Instead, it argued that "society can include the penitentiary" and that the future dangerousness issue would be meaningless if the defendant could just say, "he's going to be in there for life and he's not a threat to society then." 27 SR 1137.

Based upon the above record, it is clear that Vickers' argument that the jury was somehow misled into believing that he would be eligible for parole in a short time is utterly without merit.

Additionally, the State notes that, pursuant to Vickers' request, one of his co-defendants was allowed to testify during the guilt-innocence portion of trial that he had been charged with capital murder on the instant case and that it was his understanding that he "would have to spend 35 actual calendar years of your life [sentence] before being eligible for parole." 25 SR 807. During guilt-innocence arguments defense counsel noted this testimony that the co-defendant "was going to have to spend 35 actual calendar years in the penitentiary before even being eligible for parole." 25 SR 884. Given this testimony and argument, even if it could be assumed that the jury disregarded its instructions that "life meant life"in Texas, it would be unreasonable to believe that the jury would have thought that Vickers' would have been eligible for parole at some point earlier than 35 years.

Because the jury was not misled to Vickers' detriment, this claim does not merit this Court's certiorari review.

V.

The special issue submitted to Texas juries in response to *Penry v. Lynaugh* does not violate *Furman v. Georgia.*

Next, Vickers argues that the second special issue submitted during the punishment phase of trial, the so-called "*Penry*" special issue,[3] renders the Texas death penalty scheme

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[3] The new special issue asked the jury,

> [w]hether, taking into consideration all of the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death

unconstitutional "by permitting open-ended discretion as condemned by *Furman v. Georgia*," 408 U.S. 238 (1972). Pet. at 9. Contrary to this assertion, the addition of a new instruction in response to this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), does not result in a capital sentencing scheme that violates the principles of *Furman*.

Vickers' argument fails because it is based on a fundamental misunderstanding of this Court's holding in *Furman*. It is now well settled that a capital sentencing scheme must meet two goals in order to comply with the dictates of *Furman*: (1) it must narrow the category of persons convicted of murder who are eligible for the death penalty and (2) provide an individualized determination of the propriety of the death penalty in a particular case on the basis of the character of the individual and the circumstances of the offense. *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994). Thus, the "untrammeled discretion" with which *Furman* dealt was the unrestricted discretion to find a defendant "eligible" for the death penalty, not the discretion given to juries to consider any and all relevant mitigating evidence that a defendant proffers as a basis for a sentence less than death. *Furman*, 408 U.S. at 248 (Douglas, J., concurring). On the contrary, the Constitution demands that juries be given broad discretion to consider such mitigating evidence:

> 'Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of facts to determine whether death is the appropriate punishment.' *Ramos, supra*, at 1008. Indeed, the sentencer may

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sentence be imposed.

Tr. 406-407.

> be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.' *Zant, supra,* at 875; *see also Barclay v. Florida*, 463 U.S. 939, 948-51 (1983) (plurality opinion).

Tuilaepa, 512 U.S. at 979-80.

Accordingly, the addition of the "*Penry*" special issue did not render the Texas death penalty scheme subject to the arbitrariness condemned in *Furman*. If anything, the new instruction only serves to bring the Texas scheme into further compliance with Eighth Amendment concerns.

VI.

The definition of mitigating evidence given to the jury was not unconstitutionally narrow.

Vickers next argues that the definition of mitigating evidence given the jury was unconstitutionally narrow. However, Vickers' claim fails in light of the other instructions given to the jury.

As the Court has held,

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The jury was given the following instructions:

> You shall consider all evidence submitted to you during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty.
>
> . . .
>
> you shall consider mitigating evidence or mitigating circumstance or circumstances to be evidence, circumstance, or circumstances that a juror might regard as reducing the defendant's moral blameworthiness.
>
> . . .
>
> you are to consider all relevant mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include but is not limited to, any aspect of a defendant's character, background, record, emotional instability, intelligence, family situation or circumstances of the crime which you believe would make a death sentence inappropriate in this case.

5 Tr 406-07.

Finally, the charge instructed the jury to decide,

> [w]hether, taking into consideration all of the evidence including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death

sentence be imposed.

Tr. 406-07.

Vickers has not demonstrated that the above instructions precluded the sentencer from considering any mitigating evidence. Accordingly, this claim does not merit this Court's certiorari review.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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